

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 10005

APPELLANT'S BRIEF AND JOINT APPENDIX

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

GREAT AMERICAN INDEMNITY COMPANY,
a Corporation, *Appellant*

VS.

THEODORE BRITTON, Deputy Commissioner,
Federal Security Agency, Bureau of
Employees' Compensation, and
DOUGLAS D. TAYLOR, *Appellees*

Appeal From the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia
Circuit

FILED NOV 9 1948

Joseph W. Stewart

CLERK

PAUL J. SEDGWICK
GUY M. BAYES
Barr Building
Washington, D. C.

Attorneys for Appellant

INDEX

	PAGE
Jurisdictional Statement	1
Statement of Case	2
Statement of Points	4
Summary of Argument	5
Argument	5
Conclusion	8

TABLE OF CASES

Liberty Mu. Ins. Co. v. Hoage, 62 App. D. C. 189; 65 F. 2d 822	5
Southern Ry. Co. v. Cartwright, 64 App. D. C. 288, 77 F. 2d 546	5
Young v. Hoage, 67 App. D. C. 150, 90 F. 2d 395	7
Kobilkin v. Pillsbury, 103 F. 2d 667, 309 U. S. 619	7, 8
Potomac Electric Power Co. v. Cardillo, 71 App. D. C. 163, 107 F. 2d 962	7
Kropp v. Parker, 8 F. Supp. 290	7
Liberty Mutual Insurance Co. v. Parker, 19 F. Supp. 686	8

STATUTES, RULES OF COURT AND MISCELLANEOUS

Longshoremen's and Harbor Workers' Compensation Act (44 stats. L. 1424)	1, 2, 3, 5, 6
District of Columbia Code (1940 ed.):	
Title 36, Sec. 501	2
Title 17, Sec. 101	3

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

No. 10,005

GREAT AMERICAN INDEMNITY COMPANY,
a Corporation, *Appellant*

VS.

THEODORE BRITTON, Deputy Commissioner,
Federal Security Agency, Bureau of
Employees' Compensation, and
DOUGLAS D. TAYLOR, *Appellees*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an Appeal by Great American Indemnity Company, plaintiff in the court below, from a judgment of the District Court of the United States for the District of Columbia dismissing appellant's complaint filed therein to review and set aside a workmen's compensation award made by defendant Britton, Deputy Commissioner, against appellant and in favor of defendant Taylor. Jurisdiction in the District Court was based on an Act of Congress approved March 4, 1927 (44 stats. L. 1424) known as the

Longshoremen's and Harbor Workers' Compensation Act, which was made applicable to certain employments in the District of Columbia by an Act of Congress approved May 17, 1928 (45 stats. L. 600), and amendments thereto (Title 36, Section 501, Code of Laws of the District of Columbia, 1940 edition). This Court has jurisdiction to review the judgment under the provisions of Title 17, Section 101, of the Code of Laws of the District of Columbia (1940 edition).

STATEMENT OF CASE

Appellant, Great American Indemnity Company, filed a complaint (J. A. 2) in the District Court of the United States for the District of Columbia seeking to have reviewed and set aside a workmen's compensation order and award made by defendant Theodore Britton, Deputy Commissioner, against appellant and in favor of defendant Douglas D. Taylor. So far as they relate to the issues involved in this appeal, the allegations of the complaint were, in substance:

On March 11, 1946, defendant Taylor injured his right foot when he slipped on a stair step in a building being erected by his employer. He suffered pain in his foot immediately, was unable to walk during the following week and for several weeks thereafter could only walk with the aid of crutches, all because of the injury. May 16, 1947, more than one year after the injury, defendant Taylor filed a claim for workmen's compensation for said disability with defendant Britton, Deputy Commisisoner, following which a formal hearing was held thereon, and, on January 28, 1948, defendant Britton made certain findings of fact and passed an order and award of compensation. The findings of fact and compensation order were made part of plaintiff's complaint, as was the transcript of proceedings and testimony at the hearing held before the Deputy Commissioner (J. A. 4, 5, 16).

The uncontradicted testimony of defendant Taylor at the hearing before the Deputy Commissioner, defendant Britton, was that he was injured March 11, 1946; that he was confined to bed and unable to walk for one week immediately following his injury, and for several weeks immediately thereafter was unable to walk except with the assistance of crutches (J. A. 17, 18, 22); that he did not file his claim for compensation until May 16, 1947 (J. A. 17, 24, 25); that the reason he did not file his claim within one year was that his personal physician whom he consulted on March 11 or March 12, 1946, informed him he was not suffering from injury but from thrombosis, a diseased condition of his leg (J. A. 19, 20, 22); that after receiving treatments for the disease for several months, defendant Taylor, in November 1946, consulted another physician who then advised him that his disability had resulted from tearing of the achilles tendon and not from any disease; that the latter physician treated him until April 1947 (J. A. 26, 28, 33), when he sent him to a third physician who confirmed that the disability was caused by a tearing of his achilles tendon (J. A. 20, 21).

In the proceedings before defendant Britton, Deputy Commissioner, appellant controverted defendant Taylor's claim on the grounds:

(a) That the claim was barred by the limitations section (13(a)) of the Longshoremen's and Harbor Workers' Compensation Act because it was not filed within one year after the date of the injury as required by the statute; and (b) that the complainant's disability was not caused by an injury arising out of and in the course of his employment but by disease unrelated to his employment (J. A. 17, 18).

Following the hearing before him, defendant Deputy Commissioner Britton made findings, among others, that:

"* * * In April 1947 the true nature of the injury was discovered * * *." And, "* * * that on May

16, 1947, within a year of the time the claimant learned the true nature of the injury, he filed claim for compensation * * *; that the said claim was timely filed * * *.” (J. A. 7, 8).

On the basis of the foregoing findings, so far as pertinent to the issues involved in this appeal, defendant Britton, Deputy Commissioner, made the award of compensation benefits to defendant Taylor which the complaint sought to set aside (J. A. 5-9). Appellant’s complaint further alleged that the findings of fact made by defendant Deputy Commissioner Britton were contrary to the evidence adduced at the hearing of the claim; that there was no evidence supporting the findings of fact and award, and in particular, the findings above set forth; and that the findings of fact and award were contrary to and not in accordance with law (J. A. 4).

Defendant Britton, Deputy Commissioner, filed a motion to dismiss the complaint on the grounds:

(1) That the complaint failed to state a cause of action; and

(2) “That it appears from the complaint, together with the transcript of testimony taken before the Deputy Commissioner on January 8, 1948, that the compensation order filed by the Deputy Commissioner on January 28, 1948, complained of in the complaint is in all respect in accordance with law.”

On June 30, 1948, the District Court, after hearing on the motion, entered an order dismissing the complaint. It is from said order that this appeal is taken.

STATEMENT OF POINTS

1. The lower Court erred in granting defendant Britton’s motion to dismiss the complaint.

SUMMARY OF ARGUMENT

Appellant's complaint, with exhibits, shows that defendant Taylor's claim for compensation was barred by the limitations section (13 (a)) of the applicable compensation statute because it was not filed within one year after his injury; and that the findings and award of compensation made by defendant Britton, Deputy Commissioner, were not supported by evidence and were not in accordance with law. The complaint stated a good cause of action and should not have been dismissed.

ARGUMENT

1. Appellant's complaint to review and set aside the workmen's compensation award made by defendant Britton, Deputy Commissioner, was filed in the lower Court in accordance with the provisions of the applicable compensation statute, the Longshoremen's and Harbor Worker's Compensation Act (44 Stats. L. 1424, 33 U. S. C. A.). Section 21(b) of the statute provides:

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted . . . in the district court of the United States for the District of Columbia if the injury occurred in the District."

2. A compensation order is not in accordance with law if the order or an essential finding of fact upon which it is based is not supported by evidence. *Liberty Mu. Ins. Co. v. Hoage*, 62 App. D. C. 189, 65 F. 2d 822; *Southern Ry. Co. v. Cartwright*, 64 App. D. C. 288, 77 F. 2d 546.

3. The compensation order and award which the appellant sought to have suspended or set aside are "not in accordance with law", as shown by the complaint, including the transcript of record of proceedings before the deputy

commissioner and the findings and award made thereon, because the order and award and the findings of fact upon which they are based are not supported by evidence but, in fact, are directly contrary to the evidence in the following material respects:

The principal issue before the deputy commissioner was whether the claim was timely filed. Section 13(a) of the compensation statute provides: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury * * *". The deputy commissioner's finding on this issue was "that the said claim was timely filed."

The evidence, consisting principally of the testimony of the claimant (defendant Taylor), was, in brief, that the claim was filed May 16, 1947 (J. A. 24-25); that the injury was sustained on March 11, 1946 (J. A. 17, 18, 22) when Mr. Taylor's foot slipped off a stair-step and "felt sort of numb and dead like", making it impossible for him to put any weight on his toe (J. A. 18-19); that he did light work that day which did not entail any dependence on his injured foot (J. A. 19); that beginning the next day he was unable to use his injured foot well enough to work for seven and one-half weeks, and was confined to bed for several weeks of that period (J. A. 22); that on March 11, 1946 he went to see Dr. Milton Prosperi, who had been his family physician for the past ten years; that Dr. Prosperi recommended heat treatments, and his final diagnosis was "a thrombus in the leg, which had shut off the blood supply and caused the muscles to go dead" (J. A. 19, 21); that Dr. Prosperi informed Mr. Taylor he was suffering from an illness rather than an accident, and that he (Dr. Prosperi) had made a report to that effect (J. A. 20); that Dr. Prosperi told him then that his illness was not connected with the slipping of his foot on the stairs which had occurred about a week earlier, on March 11, 1946 (J. A. 20); that he received heat treatments from Dr. Prosperi until the doctor died that

summer (1946) (J. A. 20); that he then, in November 1946, (J. A. 20, 30) went to see Dr. Russell Payne "who said that there had been no thrombus, that the tendon was torn" (J. A. 20, 26); that he was having trouble with his foot then (J. A. 23); that Dr. Payne told him in November 1946 that Dr. Prosperi's diagnosis was mistaken and that his tendon had been torn (J. A. 20); that Dr. Payne treated his leg and in April 1947 sent him to Dr. Custis Lee Hall, who confirmed Dr. Payne's diagnosis and operated on him May 16, 1947 (J. A. 33-35); that he filed a formal claim for compensation May 15th or 16th, 1947 (J. A. 24, 25); and that the reason he failed to file his claim earlier was that "Dr. Prosperi had said that it was an illness and he could not certify as to the accident" (J. A. 22).

The evidence shows clearly that the claimant did not file his claim for compensation for more than a year after his injury. By the plain terms of Section 13 (a) of the applicable compensation statute the claim was barred. This section of the statute is mandatory and compliance therewith is jurisdictional. *Young v. Hoage*, 67 App. D. C. 150; 90 F. 2d 395. It was the manifest Congressional intent to deny compensation in all cases of disability arising from accidental injury unless claim is filed within the time limited. No provision is made for exceptional cases. *Kobilkin v. Pillsbury* (C. C. A. 9th) 103 F. 2d 667, affirmed 309 U. S. 619.

The one-year period for filing claims has been extended in a few instances where the injury was latent and the injured employee did not realize until more than a year later that he had a disabling condition. *Potomac Electric Power Co. v. Cardillo*, 71 App. D. C. 163, 107 F. 2d 962; *Kropp v. Parker*, (D. C. Md.), 8 F. Supp. 290.

Where however, as in this case, the injury is patent and observable from the beginning, and the employee is unable to work for over seven weeks immediately following his injury, failure to make claim for compensation for more than

a year bars recovery. *Liberty Mutual Insurance Co. v. Parker* D. C. Md.) 19 F. Supp. 686; *Kolbilkin v. Pillsbury*, *supra*.

In view of the foregoing it is submitted that the compensation order and award made by defendant Britton were not supported by evidence but were contrary to the evidence and contrary to law. As all the evidence before the deputy commissioner, his findings, compensation order and award were set forth in the complaint, with allegations that the findings, order and award were not supported by evidence and were not in accordance with law, the complaint stated a good cause of action and should not have been dismissed.

CONCLUSION

It is respectfully submitted that the judgment dismissing appellant's complaint is in error and should be reversed with directions to enter judgment for appellant setting aside the compensation order involved in this action.

Respectfully submitted,

PAUL J. SEDGWICK

GUY M. BAYES

Attorneys for Appellant

APPENDIX

INDEX

	PAGE
Complaint for Injunction under Compensation Statute	2A
Plaintiffs' Exhibit #1	5A
Findings of Fact	6A
Award	8A
Answer of Defendant Taylor to Complaint for Injunction under Compensation Statute and Counterclaim	9A
Defendant Britton's Motion to dismiss Complaint	11A
Answer to Britton's motion to dismiss Complaint	13A
Order Granting Motion to dismiss Petition for Judicial Review	15A
Notice of Appeal	15A
Exhibit #2	16A
Witnesses:	
Douglas D. Taylor	
Direct examination	18A
Cross examination	21A
Redirect examination	22A
Examination by the Deputy Commissioner	22A
Recross examination by Mr. Bayes	25A
Dr. Russell C. Payne	
Examination by the Deputy Commissioner	27A
Direct examination by Mr. Hawkins	27A
Cross examination	30A

Charles E. Cooley

Examination by the Deputy Commissioner	32A
Direct examination by Mr. Hawkins	32A

Dr. Custis Lee Hall

Examination by the Deputy Commissioner	33A, 36A
Direct examination by Mr. Hawkins	33A

1 A

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

No. 10005

GREAT AMERICAN INDEMNITY COMPANY, a Corporation,
Appellant,

vs.

THEODORE BRITTON, Deputy Commissioner, Federal
Security Agency, Bureau of Employees' Com-
pensation, DOUGLAS D. TAYLOR,
Appellees.

**Appeal from the United States District Court for the
District of Columbia**

JOINT APPENDIX TO BRIEFS

1 Filed Feb 27 1948 Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA

GREAT AMERICAN INDEMNITY COMPANY,
a corporation

327 Woodward Building, Washington, D. C.

Plaintiff

vs.

(1) THEODORE BRITTON, Deputy Commissioner

Federal Security Agency

Bureau of Employees' Compensation

4th Street and Independence Avenue, S. W.

Washington, D. C., and

(2) DOUGLAS D. TAYLOR

1715 Ft. Davis Street, S. E.

Washington, D. C.

Defendants

Civil Action No. 820-48

Complaint for Injunction Under Compensation Statute

1. The court has jurisdiction of the parties and subject matter of this proceeding, the object of the suit being to obtain an injunction to prevent the enforcement of, or to suspend or set aside, an award of and for compensation, pursuant to the provisions of an Act of Congress approved March 4, 1927 (44 Stats. L. 1424), known as the "Longshoremen's and Harbor Workers' Compensation Act", which was made applicable to certain employments in the District of Columbia by an Act approved May 17, 1928 (45 Stats. L. 600), and amendments thereto.

2. Plaintiff is a corporation engaged in business in the District of Columbia and brings this suit in its own right as the insurer of the employer of defendant Douglas D. Taylor, said insurer and employer being parties to the proceedings in which the compensation award complained of was issued. The defendant Theodore Britton is a

citizen of the United States and is sued as Deputy Commissioner for the District of Columbia, of the Federal Security Agency, Bureau of Employees' Compensation. The defendant Douglas D. Taylor is the employee in whose favor the compensation award was made.

3. On, to-wit, March 11, 1946, defendant Douglas D. Taylor, hereinafter called the claimant, was employed as a carpenter by Charles E. Cooley, W. O. Cooley and
 2 D. C. Gruver, trading as Cooley and Gruver, operating a building construction business in the District of Columbia, hereinafter called the employer.

4. Pursuant to said Acts of Congress the plaintiff had issued to said employer and there was in force on, to-wit, March 11, 1946, a policy of insurance, insuring payment of compensation in case of injury to or death of said employer's employees arising out of and in the course of their employment.

5. On, to-wit, March 11, 1946, while in the employ of said employer the claimant allegedly sustained an injury to his right foot when he slipped on a stairway tread in a building being erected by his employer, tearing his right achilles tendon. Claimant allegedly suffered pain in said foot immediately following said injury, was unable to walk during the following week, being confined to bed as a result of the injury; and for several weeks thereafter was unable to walk without the aid of crutches.

On the date of the alleged injury, or on the following day, the claimant consulted his personal physician who informed him that he was not suffering from an injury, but from a diseased condition of his leg, which claimant's said physician diagnosed as thrombosis and for which he treated the claimant for several months thereafter.

In November 1946 the claimant consulted another physician, who then advised him that his disability had resulted from tearing of the achilles tendon and not from any diseased condition of his foot or ankle. Said physician treated claimant for several months and, in April 1947,

sent him to a third physician, who confirmed the latter diagnosis of the cause of the claimant's disability and on May 16, 1947, performed an operation on claimant's injured foot, restoring much of its lost function.

6. On, to-wit, May 16, 1947, more than one year after the alleged injury, the claimant filed a claim for compensation for said disability with the defendant Britton, Deputy Commissioner, following which a formal hearing was held thereon, and, on January 28, 1948, said deputy commissioner made certain findings of fact and passed an order and Award of compensation, a copy of said findings and Award being attached hereto as plaintiff's Exhibit #1.

7. Plaintiff avers that the findings of fact of the said deputy commissioner are contrary to the evidence adduced at the hearing of said claim and that there is no evidence supporting the said findings and Award, and in particular the findings that "in April, 1947, the true nature of the injury was discovered" and "that the said claim was timely filed". Plaintiff further avers that the said findings of fact and Award are contrary to and not in accordance with law.

8. Plaintiff offers and makes a part hereof the transcript of the proceedings and testimony taken in the case, to be plaintiff's exhibit #2, which is prayed to be read and considered as a part of the Complaint as fully as though set forth herein.

WHEREFORE plaintiff prays:

1. That the defendant Theodore Britton, deputy commissioner, be required to certify to the court to be made part of this complaint the transcript of the proceedings and testimony taken before him in said hearing, with all exhibits thereto.

2. That an injunction issue, pendente lite and permanently, restraining the enforcement of said compensation order and Award; revoking and suspending or setting aside the same; and requiring the defendant Britton to vacate the same.

3. That the payment of said Award be stayed, pending final decision hereon.

4. And for such other and further relief as the nature of the case may require and to the court may seem just.

Paul J. Sedgwick and
Guy M. Bayes

By: Guy M. Bayes
Attorneys for Plaintiff

Barr Building
910 17th Street, N. W.
Washington, D. C.

4 Filed Feb 27 1948 Harry M. Hull, Clerk

Plaintiff's Exhibit #1

FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION
DISTRICT

In the matter of the claim for compensation under the
District of Columbia Workmen's Compensation Act
DOUGLAS D. TAYLOR, Claimant

vs.

CHARLES E. COOLEY, W. O. COOLEY and
D. C. GRUVER trading as COOLEY AND GRUVER

Employer
GREAT AMERICAN INDEMNITY COMPANY
Insurance Carrier

COMPENSATION ORDER
AWARD OF COMPENSATION

Case No. 16949-2

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

That on March 11, 1946, the claimant above named was in the employ of the employer above named, whose address is Investment Building, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the Great American Indemnity Company; that on the said day the claimant herein, while performing services for the employer as a carpenter in the District of Columbia sustained personal injury resulting in his disability when his right foot slipped on a stairway tread and he suffered a tearing of the right tendon-achilles; that the injury arose out of and in the course of the employment; that written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the claimant told the

5 employer of the injury on the day it occurred; that the claimant did not realize the nature or the seriousness of the injury, and with the knowledge of the employer he remained on the job, performing selected work until the end of the said day; that at the end of the said day the claimant's right lower leg and foot were badly swollen, discolored and painful; that as a result of the injury the claimant required medical and surgical treatment, hospital care, etc., and the employer, having knowledge of the injury, failed to furnish the same; that thereupon the claimant consulted a physician who diagnosed his condition as a thrombosis and told the claimant that the said condition was not traumatic; that the said physician treated the claimant for thrombosis, but did not afford him relief; that later the claimant consulted another physician and a surgeon and finally in April, 1947, the true nature

of the injury was discovered; that the claimant told the employer of the true nature of the injury within a day or so after the day on which the true diagnosis was made; that the employer is liable for the reasonable cost of the medical and surgical treatment, hospital care, etc., required by the claimant as a result of the injury, as follows: * * *

Doctors Hospital, Washington, D. C.	\$208.80
Kloman Instrument Co., Inc.	
1822 Eye Stret, N. W., Washington, D. C.	4.50
Maxwell and Tennyson, Druggists,	
Washington, D. C.	11.60
Drs. Groover, Christie & Merritt	
Washington, D. C.	30.00
Dr. Russell C. Payne	
1801 Eye Stret, N. W., Washington, D. C.	80.00
Dr. Milton Prosperi	
216 - 8th Street, S. E., Washington, D. C.	75.00
Ideal Orthopedic Appliance Co.	
1801 Eye Street, N. W., Washington, D. C.	27.50
Dr. Custis Lee Hall	
1801 Eye Street, N. W., Washington, D. C.	510.00

Total	\$947.40
-------	----------

that the bills for the said expenses have been paid by the claimant, except as follows:

Ideal Orthopedic Appliance Co.	\$ 27.50
Dr. Custis Lee Hall	500.00

Total	\$527.50
-------	----------

that the claimant has not fully recovered from the injury and he is still under the care of a physician; that on May 16, 1947, within a year of the time the claimant learned the true nature of the injury, he filed claim for compensation under the District of Columbia Workmen's Compensation Act against the employer;

6 that the said claim was timely filed; that the average weekly wages of the claimant herein at the time of the injury were \$72; that as a result of the injury the claimant was wholly disabled from March 12, 1946, to May 2, 1946, inclusive, and from May 16, 1947, to October 8, 1947, inclusive, 28-2/7 weeks, and for such temporary total disability he is entitled to compensation at the rate of \$25 per week (maximum rate) in the amount of \$707.14; that as a further result of the injury the claimant has a permanent partial disability, the percentage of which is not here determined; that the employer and the insurance carrier have paid nothing to the claimant as compensation.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

Award

That the employer, Charles E. Cooley, W. O. Cooley and D. C. Gruver, trading as Cooley and Gruver, and the insurance carrier, Great American Indemnity Company, shall pay compensation to the claimant herein as follows: for temporary total disability from March 12, 1946, to May 2, 1946, inclusive, and from May 16, 1947, to October 8, 1947, inclusive, 28-2/7 weeks at the rate of \$25 per week, in the amount of \$707.14, which amount is due and payable forthwith.

That the employer and the insurance carrier shall pay the reasonable cost of medical and surgical treatment, hospital care, etc., required by the claimant as a result of the injury as follows: * * *

Ideal Orthopedic Appliance Co.	\$27.50
Dr. Custis Lee Hall	\$500.00
Douglas D. Taylor (claimant)	419.90
Total	\$947.40

and shall continue to furnish the claimant with such medical and surgical treatment and hospital and other care as the nature of the injury and the process of recovery may require. * * *

A fee for legal services rendered the claimant in connection with this claim is approved in favor of Attorney Robert J. Hawkins, 1317 F Street, Northwest, Washington, District of Columbia, in the amount of \$150, the same to be a lien upon and payable out of this award.

Given under my hand at Washington, D. C.

this twenty-eighth day of January, 1948

/s/ THEODORE BRITTON

Deputy Commissioner, District of Columbia

Compensation District

* * * *

8 Filed Mar 18 1948 Harry M. Hull, Clerk

*Answer of Defendant Taylor to Complaint for
Injunction Under Compensation Statute
and Counterclaim*

For answer to plaintiff's Complaint for Injunction Under Compensation Statute, defendant Taylor states as follows:

1. Paragraph 1 of said complaint is admitted.
2. Paragraph 2 of said complaint is admitted.
3. Paragraph 3 of said complaint is admitted.
4. Paragraph 4 of said complaint is admitted.
5. Paragraph 5 of said complaint is admitted.
6. Paragraph 6 of said complaint is admitted.
7. That the allegations in paragraph 7 of said complaint are denied and that, on the contrary, the evidence adduced at the formal hearing of said claim clearly, and with abundant authority, established the basis for the finding by the deputy commissioner that "in April, 1947, the true nature of the injury was discovered" and "that the said claim was timely filed." Defendant Taylor fur-

ther states that the said Findings of Fact and Award are in complete accord with the evidence adduced at the hearing, the Longshoremen's and Harbor Workers Compensation Act, and the controlling decisions rendered thereunder.

9

Counterclaim

1. Defendant Taylor states that on, to wit, January 28, 1948, defendant Britton, Deputy Commisisoner, Federal Security Agency, Bureau of Employees Compensation, made certain findings of fact and award in favor of defendant Taylor herein, as set forth in the complaint herein, in acordance with the provisions of the District of Columbia Workmen's Compensation Act.

2. That said Finding of Fact and Award was in the total amount of One Thousand Six Hundred and Fifty-four Dollars and Fifty-four cents (\$1,654.54).

3. That the amount of said award was due and payable to defendant Taylor within ten (10) days from the date said award was entered, but the same has not been paid.

WHEREFORE, defendant Taylor prays:

1. That the complaint for injunction, pendente lite and permanent, be denied and that the Finding of Fact and Award of deputy commissioner Britton, in favor of defendant Taylor herein, be affirmed.

2. That an injunction issue requiring plaintiff herein to pay immediately to defendant Taylor the amounts due and owing to him as set forth in the Finding of Fact and Award aforesaid.

3. And for such other and further relief as to this Honorable Court may seem just and proper.

Robert J. Hawkins and
Charles Effinger Smoot

By Robert J. Hawkins
Attorneys for Defendant Taylor
606 American Building
1317 F Street, N. W.
Washington 4, D. C.

10 Filed May 7 1948 Harry M. Hull, Clerk

Defendant Britton's Motion to Dismiss Complaint

Now comes the Defendant Britton by his attorneys and moves this Honorable Court to dismiss the complaint for the following reasons:

1. That as shown by the complaint and the transcript of record filed herein the plaintiff does not state a cause of action or claim upon which relief can be granted.

2. That it appears from the complaint, together with the transcript of testimony taken before the deputy commissioner on January 8, 1948, that the compensation order filed by the deputy commissioner on January 28, 1948, complained of in the complaint, is in all respects in accordance with law.

3. For such other good and sufficient reasons as may be shown.

George Morris Fay
George Morris Fay
United States Attorney
John P. Burke
John P. Burke
Assistant United States
Attorney
Attorneys for Defendant
Britton

13 Filed May 7, 1948 Harry M. Hull, Clerk

*Memorandum of Points and Authorities in Support
of Defendant Britton's Motion to
Dismiss Complaint*

The principal question involved in this litigation is whether or not the finding of the deputy commissioner to

the effect that the claim for compensation was timely filed
 as provided in section 13(a) of the compensation law
 14 (33 U. S. C. A. sec. 913(a)) is supported by evidence.

* * * *

29 It is respectfully submitted that under the foregoing authorities the limitation in section 13(a) of the District of Columbia compensation law did not begin to run until the employee had knowledge, or became aware of the fact that he had sustained a "compensable injury"; he did not know that his disability was the result of a torn Achilles tendon which he sustained at the time of the accident on March 11, 1946, until this condition was correctly diagnosed. Whether the correct diagnosis was in November, 1946, or in April, 1947, his claim was timely filed on May 16, 1947.

* * * *

30 In view of the foregoing, it is respectfully submitted that the finding of the deputy commissioner is supported by evidence, that the compensation order is in accordance with law and that the complaint herein should be dismissed.

George Morris Fay
 George Morris Fay
 United States Attorney
 John P. Burke
 John P. Burke
 Assistant United States
 Attorney
 Attorneys for Defendant
 Britton

Ward E. Boote,
 Chief Counsel,
 Federal Security Agency,
 Bureau of Employees' Compensation.
 Herbert P. Miller,
 Assistant Chief Counsel,
 Of Counsel.

32 Filed May 29 1948 Harry M. Hull, Clerk

*Answer to Defendant Britton's Motion
to Dismiss Complaint*

1. The plaintiff's complaint, including the transcript of record of proceedings before the Defendant Deputy Commissioner, sets forth a good cause of action and should not be dismissed. * * *

2. The pertinent provisions of the applicable compensation statute are:

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any part in interest against the deputy commissioner making the order, and instituted * * * in the district court of the United States for the District of Columbia if the injury occurred in the District."

33 3. The compensation order which the plaintiff seeks to have suspended or set aside is "not in accordance with law", as shown by the complaint and the transcript of record of proceedings before the deputy commissioner (which transcript is made part of the complaint), because the compensation order and the findings of fact upon which it is based are not supported by evidence but, in fact, are directly contrary to the evidence in the following material respects:

The principal issue before the deputy commissioner was whether the claim was timely filed. Section 13(a) of the compensation statute provides: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury * * *". The deputy commissioner's finding on this issue was "that the said claim was timely filed."

The evidence, consisting of the testimony of the claimant (defendant Taylor), was, in part, that the claim was

filed May 16, 1947 (T. 17); that the injury was sustained on March 11, 1946 (T. 5) when Mr. Taylor's foot slipped off a stair-step and "felt sort of numb and dead like", making it impossible for him to put any weight on the toe of his foot (T. 5-6); that he did light work that day which did not entail any dependence on his injured foot (T. 6); that beginning the next day he was unable to use his injured foot well enough to work for seven and one-half weeks, and was confined to bed for several weeks of that period (T. 13); that on March 11, 1946 he went to see Dr. Milton Prosperi, who had been his family physician for the past ten years, and Dr. Prosperi recommended heat treatments and his final diagnosis was "a thrombus in the leg, which had shut off the blood supply and caused the muscles to go dead" (T. 6); that Dr. Prosperi informed Mr. Taylor he was suffering from an illness rather than an accident, and that he (Dr. Prosperi) had made a report to that effect (T. 8); that Dr. Prosperi told him then that his illness was not connected with the slipping of his foot

34 on the stairs which had occurred about a week earlier, on March 11, 1946 (T. 8); that he received heat treatments from Dr. Prosperi until the doctor died that summer (1946); that he then, in November, 1946, (T. 15) went to see Dr. Russell Payne "who said that there had been no thrombus, that the tendon was torn" (T. 8-9); that he was having trouble with his foot then (T. 15); that Dr. Payne told him in November 1946 that Dr. Prosperi's diagnosis was mistaken and that his tendon had been torn (T. 9-15); that Dr. Payne treated his leg and in April 1947 sent him to Dr. Custis Lee Hall, who confirmed Dr. Payne's diagnosis and operated on him May 16, 1947 (T. 8-9); that he filed a formal claim for compensation May 15th or 16th, 1947 (T. 17); and that the reason he failed to file his claim earlier was that "Dr. Prosperi had said that it was an illness and he could not certify as to the accident" (T. 13).

The evidence shows clearly that the claimant did not file his claim for compensation for more than a year after his

injury. By the plain terms of Section 13(a) of the applicable compensation statute the claim was barred.

* * * *

Paul J. Sedgwick and
Guy M. Bayes
By Guy M. Bayes
Guy M. Bayes
Attorneys for Plaintiff
Barr Building—
910 - 17th St., N. W.
Washington, D. C.

* * * *

36 Filed Jun 30 1948 Harry M. Hull, Clerk

*Order Granting Motion to Dismiss Petition
for Judicial Review*

This action came on to be heard upon the motion of the defendant, Theodore Britton, deputy commissioner, to dismiss the complaint filed herein, and upon consideration thereof, it is, this 30th day of June, 1948,

ADJUDGED, ORDERED, and DECREED, that the motion to dismiss the said complaint is hereby granted, and the complaint herein is accordingly dismissed.

T. ALAN GOLDSBOROUGH,
Justice

* * * *

37 Filed Jul 29 1948 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this 29th day of July, 1948, that Great American Indemnity Company, a Corporation, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 30th day of June, 1948, in favor of Theodore Britton, Deputy Commissioner, et al., defendants against said Great American Indemnity Company.

16 A

Paul J. Sedgwick
Guy M. Bayes
Attorneys for
Great American Indemnity
Company, A Corporation,
Plaintiff.

* * * *

Filed Aug. 31, 1948 Harry M. Hull, Clerk

FEDERAL SECURITY AGENCY
Bureau of Employees' Compensation
District of Columbia Workmen's Compensation Act
Washington, D. C.
Exhibit #2 CA 820-48
Case No. 16949-2
DOUGLAS D. TAYLOR
Claimant

vs.

CHARLES E. COOLEY, W. O. COOLEY AND D. C. GRUVER
t/a COOLEY AND GRUVER

Employer

GREAT AMERICAN INDEMNITY COMPANY
Insurance Carrier

TRANSCRIPT OF TESTIMONY AT HEARING
Before the Deputy Commissioner for the
District of Columbia
January 8, 1948.

* * * *

Filed Aug 31 1948 Harry M. Hull, Clerk

* * * *

APPEARANCES: Robert J. Hawkins, Esquire,
in behalf of the claimant
Paul J. Sedgwick, Esquire, and
Guy M. Bayes, Esquire,
in behalf of the respondents.

* * * *

The Deputy Commissioner:

* * * *

On May 16, 1947, the claimant filed claim against the employer for compensation under the District of Columbia Workmen's Compensation Act, alleging that on March 11, 1946, while he was employed by the employer in the District of Columbia, at an average weekly wage of \$72.00, he sustained personal injury resulting in his disability when his right leg and foot collapsed and he suffered the tearing of a tendon in the back of his right leg.

Will you state the claim, Mr. Hawkins?

Mr. Hawkins: Yes, sir. The claim is for loss of wages, * * * for the period from the 12th of March, 1946, to the 2nd of May, 1946, inclusive, and then again from the 16th of May, 1947, to the 8th of October, 1947, inclusive, a period of 20-2/3 weeks, or 146 days, I believe.

* * * *

The Deputy Commissioner: Now, let me understand the period of disability, just to make sure. You are claiming that the claimant was wholly disabled and unable to perform any work activity from March 12, 1946, to May 2, 1946, inclusive.

Mr. Hawkins: That is correct.

* * * *

The Deputy Commissioner: All right. The claim has been controverted by the employer and the insurance carrier. What are the grounds of controversy, Mr. Bayes?

Mr. Bayes: On the ground it is barred by Section 13 of the Act, which is the statute of limitations, in that it was not filed within one year from the date of the alleged injury, the claim stating that the injury was sustained on March 11, 1946, and that disability for 7½ weeks resulted immediately thereafter, and since the claim was not filed until May 16, 1947, it is barred by Section 13 of the Act.

A further ground of controversion is that the claimant's

disability, if any, is the result of disease not connected with the employment, rather than an injury arising out of and in the course of his employment.

There are no other issues.

* * *

Douglas D. Taylor,

* * * testified as follows:

Examination by the Deputy Commissioner

By the Deputy Commissioner:

Q State your full name and your address? A Douglas D. Taylor, 1715 Fort Davis St., Southeast, Washington.

Q Washington, D. C.? A Washington, D. C.

Direct Examination

BY MR. HAWKINS:

Q What is your trade, Mr. Taylor? A I am a carpenter.

Q By whom are you employed? A By Cooley & Gruver.

Q Are you employed by them now? A Well, I work for two firms, Cooley & Gruver and Cooley Brothers. They are the same.

Q Were you employed by them on March 11, 1946? A By Cooley & Gruver.

Q Would you state, then, to Mr. Britton what happened on March 11, and where you were, and the circumstances of the accident there? A We were working on a job at 40 Blaine Street, Northeast. We were to work on the roof that day. We went into the house and started to go up, and I put my foot on the first step of the rough stairway and it appeared to slip off, and I sort of fell down, and I started to go up again and my foot slipped off the step again, and it felt sort of numb and dead like. There wasn't a whole lot of pain, but I couldn't put any

weight on my right foot or at least on my toe, and the foreman let me do work that day which did not entail any dependence on that right foot and that night it became very painful, and I went to see Dr. Milton Prosperi and he recommended hot applications to reduce the swelling and his final diagnosis was a thrombus in the leg, which had shut off the blood supply and caused the muscles to go dead.

By the Deputy Commissioner:

Q Mr. Taylor, did you say that your foot slipped?

A Yes, I would say that it slipped off like that (indicating). The rough board on the stairway perhaps had sand on it, or something like that, which caused it to slip.

Q Which foot was this? A It was the right foot.

Q Will you describe the stairway you normally find in a house under construction, Mr. Taylor, how the dimensions of it are, and the condition of it? A The rough stairway is rough. Carriages are cut and rough boards nailed on to permit the workmen to go up and down; perhaps a board so wide (indicating) is nailed on.

Q Indicating about 8 inches. A Six to eight inches. Then the bricklayers working on that, there would be sand and dirt on the boards.

By Mr. Hawkins:

Q Was that the condition of the stairway at the time you attempted to go up? A Yes. The bricklayers had just finished before that.

Q Would you describe, then, the rest of the treatment given by Dr. Prosperi and any other physicians you may have had? A Dr. Prosperi gave me various medicines and made several diagnoses, and the final diagnosis, as I say, was the thrombus, and he gave me a treatment in a machine to accelerate the blood flow, and he had said that when the other vessels in the leg took up the load my leg would come back to almost normal.

Then Dr. Prosperi died that Summer.

Q Did you at any time discuss with him the cause of

your disability? A Why, yes. He said that the thrombus had shut off the blood supply to the lower leg and caused the muscles to go limp.

Q Did you discuss the relationship between the occurrence at the construction where you were working and the disability you suffered that evening? Did Dr. Prosperi say whether they were connected? A No. Well, he said that the thrombus would have caused the muscles to go limp.

Q Did he say you were suffering from an accident or an illness? A He said it was an illness.

Q Did he say it was or was not connected with the occurrence at the construction? A He said it was not.

By the Deputy Commissioner:

Q You described to the doctor what you have told here? A I told him that.

Q And the doctor stated he felt you had suffered a thrombus as a result of a disease, and that had caused your trouble rather than any injury you might have sustained? A That is what I understood from him; yes, sir.

By Mr. Hawkins:

Q Did Dr. Prosperi say anything to you about the nature of the report or the substance of the report which he would submit to the Commission here? A For perhaps a week I couldn't get off— couldn't walk on that leg. He had said to stay off from it, and he came to our house, and then he told us he had been asked to give a report and that he had written on the bottom of it that it was as a result of an illness rather than an accident.

Q Did you see that report? A No, I didn't actually see it.

Q Would you then describe what further treatment you had? A I took treatment all that Summer in this machine, and then Dr. Prosperi died that Summer and I went to see Dr. Russell Payne, who said that there had been no thrombus, that the tendon was torn, and he treated it and he said that there was some decalcification and he gave

me medicine for the decalcification and he sent me to Dr. Custis Lee Hall.

Q Will you explain then what happened? A Dr. Hall said the tendon was torn as a result of this accident, and he said that it could be repaired by an operation.

Q Would you tell us then what happened? A On May 16th I was operated on, and was off until— May I look at these papers?

Q Surely. A (Referring to file of papers:) Until October 9, 1947.

Q You worked October 9th? A Yes.

Q Do you recall how long you were actually in the hospital as a result of the operation? A It was 11 days, I believe. I am not positive.

Q Then what was the condition of your foot after the operation? A I was in a cast from my toes to my hip for perhaps a month, and then a part was cut off and still in a cast below my knee for another month, and then a brace up until— Well, I wore the brace until I went back to work.

* * * *

Cross Examination

By Mr. Bayes:

Q Mr. Taylor, where did you say you were working on the day the accident occurred?

* * * *

Q Was it on the same day that you went to see Dr. Prosperi? A Yes. I went to see Dr. Prosperi that night. I worked all day, and I was able to walk around.

Q Was Dr. Prosperi your family physician? A I had been going to him perhaps ever since I was in Washington, perhaps 10 years.

Q And that is the reason you chose to go to him at that time; is that correct? A Yes, sir.

* * * *

Q How long were you totally disabled following the accident of March 11, 1946?

* * * *

Q I believe you stated that you were not able to walk on that foot for about 7½ weeks? A No. I could walk on it before that. I was on crutches for several weeks, and then it was so weak that I couldn't work.

Q And were you confined to your bed for part of that period? For how long? A For several weeks, I would say. It has been a long time ago. I don't remember exactly.

Q You were unable to use the foot to a sufficient extent to enable you to work? A For seven weeks, seven and a half weeks.

Q And that was immediately following the accident in March, March 11, 1946? A That is right.

* * * *

Redirect Examination

By Mr. Hawkins:

Q What was the reason you failed to file your claim for compensation, Mr. Taylor? A Dr. Prosperi had said that it was an illness and he could not certify as to the accident, and we let it go at that.

Q Accepted his— A Accepted his diagnosis and his word.

Mr. Hawkins: That is all.

Examination by the Deputy Commissioner

By the Deputy Commissioner:

Q Mr. Taylor, did you report what happened to you, to your employer? A I told Mr. Cooley about the accident that day. He came on the job that day.

Q You mean the day it occurred? A The day it occurred; yes.

Q And Mr. Cooley is one of the firm of Cooley & Gru-

ver? A Well, I reported it to the younger Mr. Cooley. I take him to be a member of the firm; yes, sir.

Q As far as you know, he was a member of the firm?

A Yes.

Q He was your superior in the employment? A Yes.

Q You told him what had happened to you? A Yes.

Q I believe you said that the foreman permitted you to do light work or selected work on that day? A Yes, that is right.

Q And you remained on the job until the end of the day? A Yes.

Q Did you receive a full day's pay for that day?

A Yes, I did.

Q When did you first go to Dr. Payne, or do you recall?

A May I look at these papers?

Q Yes. A (After referring to papers:) I don't know that I can give the exact date.

The Deputy Commissioner: Let the record show that the claimant is looking at a file, and I think we should know what that file represents.

By the Deputy Commissioner:

Q Is that your file on your claim? A Yes, just letters, copies of letters.

Q All right. A I went to him in November. I don't know the exact date.

Q In November, 1946? A Yes, sir.

Q You were back on the job at that time? A Yes, sir; I was back on the job at that time.

Q Were you having some trouble? A Well, I couldn't put my weight on my toe.

Q I see. That is why you went to Dr. Payne? A Yes, sir. I was still weak.

Q All right. When did Dr. Payne tell you he felt it was some mistake on the part of Dr. Prosperi in making a diagnosis of this case? A Immediately.

Q In November? A November.

Q 1946? A Yes, sir.

Q What did he do for you in the way of treatment?

A He gave me medicine to correct this decalcification, as he called it, and he sent me to Dr. Hall.

Q When did he send you to Dr. Hall? A That was in April. He treated me over the first of the Winter.

Q You went to Dr. Hall on the suggestion of Dr. Payne?
A Yes, sir.

Q Did you say anything to your employer about the information given to you by Dr. Payne and Dr. Hall with respect to the nature of your condition? A Yes, I told him.

Q Who did you tell? A Mr. Emery Cooley.

Q Mr. Emery Cooley. He is a member of the firm of your employer? A Yes, sir.

Q When did you tell him? A I told him what Dr. Hall told us a day or so after that, when I first saw him, after we had gone to Dr. Hall.

Q I see. A I told him Dr. Hall had recommended the operation.

Q Now you wrote a letter to this office under date of April 15, 1947. Do you have a copy of that in your file?

A Yes, I have one here.

Q Was that after you had been examined by Dr. Hall?
A Yes, it was after.

Q And after Dr. Hall had told you what he thought was wrong with your leg? A Yes, sir.

Q How soon after learning of the true condition, true nature of your condition, was it that you wrote this letter?

A Within— It was written on the 15th, I believe the letter is dated.

Q That is right. A And we inquired around to different people as to what we should do, and we finally went to Mr. Cochran.

Q I see. A This letter was delivered to Mr. Cochran; it was not mailed.

Q I see. And then you finally did file a formal claim on

the prescribed form for that purpose, and you did that on May 16th? A May 16.

Q 1947? A Yes, sir; it was the 15th or 16th.

* * * *

The Deputy Commissioner: Let me state for the record, the file in this case shows that the employer submitted a report of the incident which has been described by the claimant, as occurring on March 11, 1946, and that the said report from the employer was received in the office of the Deputy Commissioner on March 15, 1946. The file also contains a letter addressed to the office of the Deputy Commissioner under date of April 15, 1947, by the claimant, in which he refers to the difficulty he had had with his foot or leg, to the diagnosis made by Dr. Prosperi and to the fact that Doctors Payne and Hall had reached a different conclusion with respect to the nature of his condition. The said letter was received in the office of the Deputy Commissioner on April 24, 1947.

* * * *

The Deputy Commissioner: The file further discloses that the Great American Indemnity Company, the insurance carrier for the employer, filed with the Deputy Commissioner a notice of controversy. The notice is dated March 27, 1946, and was received in the office of the Deputy Commissioner on March 28, 1946, and the notice ascribes as a ground for controversy: "Disability, if any, not as a result of accidental injury arising out of and in the course of regular employment."

* * * *

Recross Examination

By Mr. Bayes:

Q Mr. Taylor, when you went to Dr. Prosperi,—I believe you said on the same day of the injury? A Yes, sir.

Q You told him of your slipping or falling on the stairway, did you not? A Yes, sir.

Q And gave him a full account of that occurrence, and he told you at that time that that was not what caused your leg to go dead? A Yes.

Q But that it was a thrombus, a disease? A I don't believe he arrived at the diagnosis immediately, but within a few days.

* * * *

Q So that Dr. Payne did not examine you until some time in November of 1946? A That is right.

Q And Dr. Hall did not see you at all until some time in April, 1947; is that correct? A That is right.

* * * *

By the Deputy Commissioner:

Q Now, Mr. Taylor, what is the condition of your foot and leg at this time? A It is very good. It is getting stronger all the time.

Q Do you think you have made a full recovery from this condition? A It is not complete, because the leg has not gone back to normal; it was shrunk up so bad when it was out of use that it has not come back completely yet.

Q What about the strength of the leg? A It is much better.

Q Is it back to normal? A Not completely normal yet.

Q Are you still under treatment? A I go back to Dr. Hall every month or so for examination.

Q Observation? A Observation, I should say.

The Deputy Commissioner: All right.

Mr. Bayes: Mr. Commissioner, may I ask one other question about that, please?

The Deputy Commissioner: Yes.

By Mr. Bayes:

Q When did you return to work regularly? A October 9, 1947.

Q And you have worked continuously since that time? A Since that time; yes, sir.

Mr. Bayes: Thank you.

(Thereupon the witness was excused and retired from the witness stand.)

The Deputy Commissioner: All right. Now I believe we have one of the doctors present, have we not?

Mr. Hawkins: Yes, we do. Dr. Payne.

Thereupon

Dr. Russell C. Payne

was called as a witness for and on behalf of the claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Examination by the Deputy Commissioner

By the Deputy Commissioner:

Q Doctor, state your full name and address?

A Russell C. Payne, 1801 Eye Street, Northwest, Washington, D. C.

Direct Examination

By Mr. Hawkins:

Q Dr. Payne, you are a licensed physician practicing in the District of Columbia? A Yes, sir.

Q Did you ever treat Mr. Douglas Taylor, this gentleman here? A Yes, sir; I have.

Q Would you describe or tell Mr. Britton when it was, and describe the results of your examination and treatment and your diagnosis, please.

The Deputy Commissioner: Explain how the man came to you, Doctor. A I first saw Mr. Taylor November 18, 1946, and I think he was referred at that time by his wife, who was a patient in the office, and his history was this: That about March the patient started having trouble with his right leg; the last x-ray was taken three or four months ago by Dr. Prosperi in his office. He diagnosed the case then, according to the patient's history, as a blood clot and calcification of the bone. Little swelling and pain was evident at this time, and when this first happened the

tendon in the back of his leg collapsed. He received about 10 treatments of the vasodilator, but these did not seem to help. Of course, we saw the patient at that time. We started treatment then. I think I sent the patient the following March to Dr. Hall for consultation, after having sent him to Groover, Christie & Merritt for x-rays, and they could not confirm the diagnosis by x-ray. We told him he did have difficulty with the tendon, the nature of which we were not sure, but it was not a vascular thing at all; it was more of a bone degeneration, the nature of which was not evident, the etiology evident, as yet. Dr. Hall confirmed that diagnosis, and as long as medical treatment was not doing as it should do at that particular time he suggested the surgery, which was carried out.

Q As a result of your examination and the account of the history of the disability given to you by Mr. Taylor, what would you say as to the causal connection existing between this incident on the building construction and the patient's disability?

Mr. Bayes: I object.

By the Deputy Commissioner:

Q Did you get a history? Did you get a detailed history of the onset of this man's difficulty, Doctor? A As I remember, yes. That would have to be from memory.

Q What was it? A As I remember, Mr. Taylor told me— Mr. Taylor may correct me on this. I think he told me that the injury took place while he was walking up the steps on the job. Is that right?

Now I haven't talked to him in four or five months, and that is from memory. At the time we went into that he said he noticed this pain, discomfort, while walking up the steps on the job.

Q That is approximately his testimony here today under oath, as I recall it. My recollection is this, that he stated he was walking up the temporary stairway of a building under construction. There were boards on the

stairway; that the workmen, various workmen, were using this stairway; that the bricklayers had been using it, and that the stairway was covered to some extent by sand and other debris you find around a building under construction; he stated that he thought that his foot slipped on the stairs, apparently he placed his foot on the stairway board, using the ball of his foot, with his heel extending back over the edge, and his foot just slipped down or gave way. That is the story, as I recall it.

Now, as I understand, Mr. Hawkins' question is this: Do you feel there is any causal relation between what happened to the claimant at that time and what he was doing?

A It is very possible, yes.

Mr. Bayes: Mr. Commissioner, for the purpose of the record, I objected to the form of his question on the ground it was leading. You rephrased the question in such a way that I would have no objection to it, but I would like a ruling on my objection.

The Deputy Commissioner: Mr. Hawkins' question was not the question the doctor answered. Go ahead, Mr. Hawkins.

By Mr. Hawkins:

Q Dr. Payne, this thrombosis or phlebitis, or whatever this disease is, is that a common disease for a man Mr. Taylor's age? Mr. Taylor, I believe, is 37. A No, it is not a relatively common disease for a man of that age, any man in particular.

By the Deputy Commissioner:

Q Did you find this man suffering from either of those conditions, Doctor? A There was no evidence of any vascular disease whatever at the time we examined him.

By Mr. Hawkins: Did you have Dr. Prosperi's record? Did Mr. Taylor give you Dr. Prosperi's record, or simply give you his own account of it? A No. He had only Dr. Prosperi's x-rays, which compared with those of Groover, Christie & Merritt. We had no written reports at all.

Q Have you known of any other cases where a thrombus

or phlebitis were confused, or a similar misdiagnosis was made? A No, I have not.

Mr. Hawkins: I have no further questions.

Cross Examination

By Mr. Bayes:

Q Doctor, you did not see Mr. Taylor at any time until November 18, 1946? That is correct, is it not? A The date I first mentioned is the date the history was taken, November 18, 1946.

Q Your statement that there is a causal connection or may possibly be between his present condition or the condition for which you treated him and his slipping on the stair was based solely on his statement to you that he had sustained such an injury, was it not?

The Witness: Will you restate that.

(Thereupon the question was read by the reporter, as above recorded.)

A Based on his history, yes.

Q Did he state to you anything that had occurred prior to his falling, or afterwards, that might have any relation to it? A No, not to my knowledge.

Q Did you question him as to whether he had previously had an accident outside of his employment, or some other kind of injury, to his ankle? A We asked him at the time had any other injury of this type occurred, or had he had any other defects of this nature, which I believe he denied at that time.

Q Did you ask him whether or not after March 11, 1946, and between then and the time you saw him in November, whether anything had happened to his ankle? A As I remember, there was nothing which occurred in the history, other than Dr. Prosperi's examination, — I mean, in the ordinary occurrence of events, — which would be contributory to that type of injury.

Q You have been asked whether or not in your opinion the disability from which he was suffering when he came to you was caused by slipping and falling on the stair, and

your answer was that there might possibly be; is that correct? A That is right.

Q You don't feel it could be positively stated that that was the cause, do you, Doctor? A I made that general statement because with that history you would certainly think that was the sole cause of that type of disability. This type of injury or this type of disability is seen at other times; as I say, the whole etiology or cause is not known; we don't know what the preceding effects are that led up to that injury, or whether it is solely the injury alone. That is the reason I qualified the statement. But to your knowledge, that was the only thing pointing to that particular injury, the only cause for it which we could find.

By the Deputy Commissioner:

Q What was the exact diagnosis, Doctor, as made by you and Dr. Hall, and as confirmed by the operation? A At the time we made our diagnosis we said there was a decalcification of the bone, an abolition of the Achilles tendon without any decalcification of bone, it did not go into bone decalcification. The x-ray bore out some decalcification of bone, however.

Q When you say decalcification you mean, more exactly, osteoporosis, do you not? A That is right.

Q Your examination was made some months following the injury? A That is right.

Q Could the osteoporosis observed at the time of your examination have been the result of disuse during the period between the time of the injury and the time of your examination? A Undoubtedly some of the decalcification or osteoporosis was due to the disuse, as was the shrinking of the calf of the leg and the remaining soft tissue. The x-ray report states that there was decalcification, extensive decalcification in the bones of the foot, which would indicate through disuse. That evidently began at a localized point because it appeared in the bones of the foot at the time we first examined it.

Q Do you think it began at the time of the tearing of the tendon? A Not having had any preceding x-rays, I would assume so; yes.

Q As I understand your testimony, it is this: In the absence of a history of any other untoward event it is your opinion that this slipping on the stairway resulted in a tearing away or an abolition of the Achilles tendon from the os calcis? A Yes, sir.

* * * *

Charles E. Cooley

was called as a witness for and on behalf of the claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Examination by the Deputy Commissioner

By the Deputy Commissioner:

Q State your full name and your address, Mr. Cooley?

A Charles Emery Cooley, Jr., 1474 Somerset Place, Washington, D. C.

Direct Examination

By Mr. Hawkins:

Q Are you a member of the firm of Cooley & Gruver?

A Yes, sir.

Q Is that firm the employer of Mr. Taylor here? A Yes, sir.

Q I would like to ask you, Mr. Cooley, did you know that Mr. Taylor was going to Dr. Prosperi at the time or subsequent to his accident on the job? A I didn't know the doctor's name. You mean before or after?

Q Well, at any time around then? A I didn't know the doctor's name, but I knew he was going to some doctor.

Q Did you ever suggest that he go to some other physician? A No, sir. I told him when he was injured that he could go either to the hospital, or to his own family physician.

* * * *

Dr. Custis Lee Hall

was called as a witness for and on behalf of the claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Examination by the Deputy Commissioner

By the Deputy Commissioner:

Q This is Doctor Custis Lee Hall, 1801 Eye Street, Northwest. A Yes, sir.

The Deputy Commissioner: A witness for the claimant. All right, Mr. Hawkins.

Direct Examination

By Mr. Hawkins:

Q Doctor, would you state briefly your education, experience and specialization, please?

The Deputy Commissioner: Doctor Hall is well known to the Deputy Commissioner.

Mr. Hawkins: I am sure of that, sir.

The Deputy Commissioner: Dr. Hall is an orthopedic specialist, outstanding.

Mr. Bayes: I am quite familiar with the doctor's qualifications, and I don't think it is necessary to put anything further in the record about it.

By Mr. Hawkins:

Q Doctor Hall, you attended the patient, the claimant, Mr. Taylor? A Yes, sir.

Q Would you state the circumstance under which he came to you and the story or history of the case and diagnosis and treatment, and final result, please? A Douglas Taylor was referred to our office by Doctor Payne on April 4, 1947, at which time he stated that he was 38 years old, a carpenter by occupation; complained of his left foot and

ankle, stating that the year previously—I think it was March, 1946, his right ankle suddenly collapsed while on the stairs. At the onset the ankle was swollen and discolored; he stayed away from his work for nine weeks; that he felt there was some disability about the ligaments and control of the ankle, he was unable to rise on his toes normally on the right side of his body, with the lift being very weak in the portion of the body of the right foot. He also noticed an atrophy or wasting of the right foot muscles.

Q This was his statement to you? A Yes, sir. The examination is next.

By measurement, he had an inch atrophy of the right calf. I found the right foot could be forced into extreme of extension of 45 degrees, which indicated an abnormality of the tone and structure of the posterior muscles of the leg and the tendon of Achilles, while the opposite left foot could be brought normally to a tension of 90 degrees. He had very little power of downward thrust of the foot against resistance. I also found he had a slipping tendon in the outer side of his ankle, so that it slipped over the external malleolus so it could go back easily. I could find at that time no point on manipulation of the foot or ankle, but I found that the tendon of Achilles had been torn through its major part, and there were several shreds which could be felt still connected between the two ends, especially on the lateral or outer side of the tendon, and I also found on palpation a marked depression at the level of the insertion of the Achilles tendon into the heel.

He also complained of his right elbow, which I examined at that time, which I can describe or not, as you wish.

Q I don't believe so, sir; it is not involved here. A On x-ray of the right foot it was negative, including the ankle joint, including a slight sharpening of the ankle joint. The heel or os calcis looked normal except for a little osteoporosis, which is our term for deficient calcium circulation due to functional disturbance.

I advised him at that time he needed a repair of the adverse tendon by means of vascular transplantation.

I also have a copy of a letter which I wrote to the Nichols Company, describing briefly the case and report.

The Deputy Commissioner: The Nichols Company is a firm of independent insurance adjusters who were representing the insurance carrier Great American Indemnity Company in this case.

Go ahead, Doctor.

A (continuing:) I simply summarized my findings by stating that after reviewing the findings, this is in the nature of a tearing of the tendon, and not in the nature of illness in any way. I understand it was described at that time as thrombosis, and I stated that to be a complication, possibly, of a tearing of the tendon which apparently was not discovered. I also outlined what was necessary and a period of disability extending over five or six months, and an approximate fee for surgery and after care of \$500.00.

The patient then was operated on at Doctors' Hospital on May 16, 1947, at which time the incision was made over the tendon of Achilles, which was found to be torn and shredded. A second incision was made along the outer side of the thigh. A long strip of fascia was removed which was then woven into place to replace the defect in the tendon.

The patient stood the operation well, remained in the hospital until May 26th. He returned for check up to the office on June 10th, June 24th, and the cast was removed which had been applied to prevent any possible damage to the repaired tendon; then he had physiotherapy treatments the latter part of June, up through the month of July, and a brace was supplied to be worn to prevent forcible extension of the foot.

The follow up notes indicated that he got gradual repair of the tendon, with good function as of November 21, 1947; that he had greater strength of the muscles which had

become atrophied. He still had some thickening and little tenderness about the tear of the tendon.

I felt that he had a satisfactory follow up of a procedure necessary to repair the tear in the tendon, and during September and October he stated he was able to walk quite a number of blocks each day, and he was gradually leaving off the brace.

That, I think, summarizes the notes in this particular case.

Examination by the Deputy Commissioner

By the Deputy Commissioner:

Q Is the claimant still under your care, Doctor? A Yes, sir. His last visit to my office was December the 22nd.

Q How much longer do you anticipate he will remain under your care? A I don't believe he will need any particular type of therapy or treatment, but I do feel he should be under observation at periods possibly of two or three months for about a year, which is an adequate time for a follow up, and then I think we should be able to properly evaluate any residual difficulties that may remain.

Q Do you anticipate there will be a complete recovery in this case? I mean, do you feel that the claimant will regain the full use of his foot and leg? A I think he will probably have some residual permanency in the functional use and stress of this extremity; I can't tell you the percentage or amount of that at this time.

The Deputy Commissioner: I see.

By Mr. Hawkins:

Q Now, Doctor, did the patient give you any history or account of how this disability arose? A He stated to me that when he was on the stairs, that his foot suddenly collapsed, that he was unable to use it, and that the swelling followed the next day, and the disability was prompt following that particular episode.

Q Did the account which he gave you of the incident that gave rise to the disability and the symptoms observed by him or by any previous physician, did they agree with your examination or seem reasonable or coincide with what you found on your examination? A Yes. I might state that his story of what happened and the symptoms following are entirely consistent with my examination. As a cause, I think there was no question but what he had a torn tendon of Achilles.

Q And you diagnosed it as such and treated it as such, and then was his response to your diagnosis and treatment satisfactory to you? A Yes, sir, and the diagnosis was confirmed at operation. There was no question about it at all.

**In the United States Court of Appeals
District of Columbia Circuit**

GREAT AMERICAN INDEMNITY COMPANY, A Corporation,
Appellant,

v.

THEODORE BRITTON, Deputy Commissioner Federal Security
Agency, Bureau of Employees' Compensation, and
DOUGLAS D. TAYLOR, *Appellees.*

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES

**United States Court of Appeals
for the District of Columbia
Circuit**

FILED DEC 10 1948

Joseph W. Stewart
CLERK

GEORGE MORRIS FAY,
United States Attorney

JOHN D. LANE,
*Assistant United States Attorney
Attorneys for Appellee Britton*

ROBERT J. HAWKINS
Attorney for Appellee Taylor

WARD E. BOOTE
*Chief Counsel
Bureau of Employees' Compensation
Federal Security Agency*

HERBERT P. MILLER
*Assistant Chief Counsel
of Counsel*

INDEX

	Page
Counterstatement of case -----	1
Statute involved -----	4
Question involved -----	4
Summary of argument -----	4
Argument -----	5
Conclusion -----	20

TABLE OF AUTHORITIES CITED

<i>Alford v. Industrial Accident Commission</i> , 169 P. (2d) 641 (Cal. 1945) -----	17
<i>Anderson v. Contract Trucking Co.</i> , 48 N. M. 158, 146 P. (2d) 873 (1944) -----	15
<i>Anderson v. Hoage</i> , deputy commissioner, 63 App. D. C. 169, 70 F. (2d) 773 (1934) -----	6
<i>Associated General Contractors of America, Inc. v. Cardillo</i> , deputy commissioner, 70 App. D. C. 303, 106 F. (2d) 327 (1939) -----	19
<i>Avignone Freres, Inc. et al. v. Cardillo</i> , deputy commissioner, 149, 117 F. (2d) 385 (1940) -----	6
<i>Baldin v. Scullion</i> , 50 Wyo. 508, 62 P. (2d) 531 (1936) -----	13
<i>Baltimore & Philadelphia Steamboat Co. v. Norton</i> , deputy commissioner, 284 U. S. 408 (1932) -----	19
<i>Bridges v. Fruin-Colnon Construction Co.</i> , 52 S. W. (2d) 582 (Mo. 1932) -----	17
<i>Burley Welding Works, Inc. v. Lawson</i> , deputy commissioner, 141 F. (2d) 964 (C.C.A. 5, 1944) -----	6
<i>Cardillo</i> , deputy commissioner <i>v. Liberty Mutual Ins. Co.</i> , 330 U. S. 469 (1947) -----	20
<i>Commercial Casualty Insurance Co. v. Hoage</i> , deputy commissioner, in Equity No. 57926, in memorandum opinion by Justice Adkins, filed January 29, 1936 -----	12
<i>Contractors, PNAB v. Pillsbury</i> , deputy commissioner, 150 F. (2d) 310 (C.C.A. 9, 1945) -----	6, 6
<i>Crowell</i> , deputy commissioner <i>v. Benson</i> , 285 U. S. 22 (1932) -----	5
<i>Del Vecchio v. Bowers</i> , 296 U. S. 280 (1935) -----	5, 6, 6
<i>DeWald v. Baltimore & O. R. Co.</i> , cert. den. October 8, 1934, 293 U. S. 581 -----	19
<i>DiGiorgio Fruit Corporation v. Norton</i> , deputy commissioner, et al., 93 F. (2d) 119 -----	11
<i>Dryden v. Omaha Steel Works</i> , 148 Neb. 1, 26 N. W. (2d) 293 (1947) -----	12
<i>Eastern Steamship Lines, Inc. v. Monahan</i> , deputy commissioner, et al., 21 F. Supp. 535 (Me. 1937) -----	6

	Page
<i>Fee v. Department of Labor and Industries</i> , 151 Wash. 337, 285 P. 741 (1929) -----	16
<i>Fidelity & Casualty Co. of New York v. Burris</i> , 61 App. D. C. 228, 59 (F) (2d) 1042 (1932) -----	19
<i>Grain Handling Co., Inc. v. McManigal</i> , deputy commissioner, 23 F. Supp. 748 (N. Y. 1938) -----	6
<i>Grant v. Marshall</i> , deputy commissioner, 56 F. (2d) 654 (Wash.) (1931) -----	5
<i>Gulf Oil Corporation v. McManigal</i> , deputy commissioner, 49 F. Supp. 75 (W. Va. 1943) -----	5
<i>Henderson</i> , deputy commissioner v. <i>Pate Stevedoring Co. Inc.</i> , 134 F. (2d) 440 (C.C.A. 5, 1943) -----	6
<i>Hickman v. Dunlop Tire</i> , 185 S. W. (2d) 874 (Mo. 1945) -----	17
<i>Kobilkin v. Pillsbury</i> , deputy commissioner, 103 F. (2d) 667 (C.C.A. 9, 1939), aff'd 309 U. S. 619 -----	18
<i>Kropp v. Parker</i> , deputy commissioner, 8 F. Supp. 290 (Md.) -----	12, 17
<i>Liberty Mutual Insurance Co. v. Parker</i> , deputy commissioner, 19 F. Supp. 686 (Md. 1937) -----	18
<i>Liberty Mutual Ins. Co. v. Gray</i> , deputy commissioner, 137 F. (2d) 926 (C.C.A. 9, 1943) -----	5, 6
<i>Lowe</i> , deputy commissioner v. <i>Central R. Co. of New Jersey</i> , 113 F. (2d) 413 (C.C.A. 3, 1940) -----	6, 6
<i>Luckenbach Steamship Co., Inc. v. Norton</i> , deputy commissioner, 96 F. (2d) (C.C.A. 3, 1938) -----	6
<i>C. F. Lytle Co. v. Whipple</i> , deputy commissioner, 156 F. (2d) 155 (C.C.A. 9, 1946) -----	6
<i>Jules C. L'Hote, et al. v. Crowell</i> , deputy commissioner, 286 U. S. 528 (1932) -----	5
<i>Marshall</i> , deputy commissioner v. <i>Pletz</i> , 317 U. S. 383 (1943) -----	5
<i>Marsh v. Industrial Accident Commission</i> , Cal. 338, 18 P. (2d) 933 (1933) -----	15
<i>McGuire v. Phelan-Shirley Co.</i> , 111 Neb. 609, N. W. 615 (1924) -----	15, 16
<i>Michigan Transit Corporation v. Brown</i> , deputy commissioner, 56 F. (2d) 200 (Mich. 1929) -----	6
<i>National Casualty Company v. Cardillo</i> , deputy commissioner, 148 F. (2d) 117 (App. D. C.) -----	12
<i>Nelson v. Marshall</i> , deputy commissioner, 56 F. (2d) 654 (Wash. 1931) -----	5
<i>Parker</i> , deputy commissioner v. <i>Motor Boat Sales, Inc.</i> , 314 U. S. 244 (1941) -----	5, 5, 6
<i>Potomac Electric Power Company v. Cardillo</i> , deputy commissioner, 107 F. (2d) 962, 71 App. D. C. 163 (1939) -----	11
<i>Raymond v. Industrial Accident Commission</i> , 354 Ill. 586, 188 N. E. 861 (1934) -----	10
<i>Selders v. Cornhuster Oil Co.</i> , 111 Neb. 300, 196 N. W. 316 (1923) -----	14, 15
<i>Simmons v. Marshall</i> , deputy commissioner, 94 F. (2d) 850 (C.C. A. 9, 1938) -----	6
<i>South Chicago Coal & Dock Co., et al. v. Bassett</i> , deputy commissioner, 309 U. S. 251 (1940) -----	5, 6

	Page
<i>Swift & Company v. State Industrial Commission</i> , 161 Okla. 132, 17 P. (2d) 435 (1932) -----	17
<i>Tice v. State Industrial Accident Commission</i> , 195 P. (2d) 188 (Ore. 1948) -----	17
<i>United Employees Casualty Co. v. Summerous</i> , 151 S. W. (2d) 247 (Tex. 1941) -----	5
<i>Voehl v. Indemnity Insurance Co. of North America</i> , 288 U. S. 162 (1933) -----	6
<i>White v. Morgan and Wright</i> , 217 Mich. 499, 187 N. W. 257 (1922)	16

STATUTE

District of Columbia Workmen's Compensation Act of May 17, 1928 (45 Stat. 600, c. 612, sec. 1; D. C. Code (1940), Title 36, sec. 1) -----	2
Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; U. S. C., Title 33, c. 18, sec. 901, et seq.)	4

In the United States Court of Appeals District of Columbia Circuit

No. 10005

GREAT AMERICAN INDEMNITY COMPANY, A Corporation,
Appellant,

v.

THEODORE BRITTON, Deputy Commissioner Federal Security
Agency, Bureau of Employees' Compensation, and
DOUGLAS D. TAYLOR, *Appellees.*

**Appeal from the United States District Court for the
District of Columbia**

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF CASE

This case arises upon a complaint for judicial review of a compensation order filed on January 28, 1948, by Theodore Britton, deputy commissioner, Federal Security Agency, Bureau of Employees' Compensation, in which he awarded Douglas D. Taylor compensation as a result of injuries he sustained on March 11, 1946, while he was employed as a carpenter by Cooley and Grover, in the District of Columbia. The compensation order was issued pursuant to the provisions of the workmen's compensation law in effect in the District of Columbia, namely, the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; 33 U. S. C. A. sec. 901 *et seq.*), as made applicable to the District of Columbia by Act of May

17, 1928, 45 Stat. 600 (D. C. Code (1940) 36-501), referred to hereinafter as the "compensation law".

On March 11, 1946, Douglas D. Taylor, hereinafter called "claimant" was working as a carpenter when his right foot slipped on a stairway tread, tearing the tendon Achilles. (Claimant, of course, did not know at the time, nor for a long period of time thereafter, that the tendon was torn, nor did he know the nature of the injury). His employer knew of the accident immediately and gave claimant selected work for the remainder of the day. The leg became swollen, discolored and painful and claimant consulted his own physician at the end of the day. The physician treated him and at the end of the week told him that the condition was due to a thrombus, a disease and not an accident. The same physician continued to treat claimant until some time in the summer of 1946, when the former died and thereafter (in November, 1946) claimant consulted another physician who diagnosed the condition as not due to vascular disease but to a bone condition, the exact nature of which was not then evident and could not be confirmed by x-ray (28 A). Conservative treatment by the second physician apparently was not successful and claimant was operated upon in May, 1947, by a third physician resulting in the cure of the condition, at which time the diagnosis by the operating physician of a torn tendon was confirmed.

Claimant filed his formal claim for compensation on May 16, 1947. The insurance carrier for the employer, appellant, controverted the claim upon the ground that it was not filed within one year from the injury as required by Section 13 (a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. sec. 913 (a)). A hearing was held before the deputy commissioner and upon the evidence adduced the deputy commissioner issued the compensation order complained of, in which he found that the claim was timely filed and awarded compensation.

The deputy commissioner in the compensation order complained of found the facts with reference to the accident and the filing of the claim for compensation as follows:

“That on March 11, 1946, the claimant above named was in the employ of the employer above named, whose address is Investment Building, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled ‘An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes’; that the liability of the employer for compensation under the said Act was insured by the Great American Indemnity Company; that on the said day the claimant herein, while performing services for the employer as a carpenter in the District of Columbia, sustained personal injury resulting in his disability when his right foot slipped on a stairway tread and he suffered a tearing of the right tendon-Achilles; that the injury arose out of and in the course of the employment; that written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the claimant told the employer of the injury on the day it occurred; that the claimant did not realize the nature or the seriousness of the injury and with the knowledge of the employer he remained on the job, performing selected work until the end of the said day; that at the end of the said day the claimant’s right lower leg and foot were badly swollen, discolored and painful; that as a result of the injury the claimant required medical and surgical treatment, hospital care, etc., and the employer, having knowledge of the injury failed to furnish the same; that thereupon the claimant consulted a physician who diagnosed his condition as a thrombosis and told the claimant that the said condition was not traumatic; that the said physician treated the claimant for thrombosis, but did not afford him relief; that later the claimant consulted another physician and a surgeon and finally in April, 1947, the true nature of the injury was discovered; that the claimant told the employer of the true nature of the injury within a day or so after the day on which the true diagnosis was made; * * * that on May 16, 1947, within a year of the time the claimant learned the true nature of the injury, he filed claim for compensation under the District of Columbia Workmen’s Compensation Act against the employer; that the said claim was timely filed;”

Appellant thereupon commenced a proceeding for judicial review of the compensation order, alleging that it is not in accordance with law. A motion to dismiss the complaint was filed on behalf of the deputy commissioner, appellee, which was granted. It is from the judgment dismissing the complaint that the present appeal was taken.

STATUTE INVOLVED

Section 13 (a) of the compensation law (33 U. S. C. A. sec. 913 (a)) which provides as follows:

“The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.”

QUESTION INVOLVED

The sole question involved is whether the term “injury” as used in Section 13 (a) *supra*, relating to the time for filing claim is synonymous with “accident”, and if not, when the time for filing claim for compensation begins to run in a case in which the employee does not know of the causal relation between his disability and an accidental occurrence while at work.

SUMMARY OF ARGUMENT

The deputy commissioner found in the compensation order complained of that the claim for compensation was timely filed and the evidence supports said finding. Under the authorities, a finding thus supported is final and conclusive.

ARGUMENT

I.

The Finding of the Deputy Commissioner to the Effect that the Claim was Timely Filed is Supported by Evidence.

Before referring to the evidence, which in our opinion supports the finding complained of, it may not be inappropriate to invite attention to the following well established principles of compensation law.

In the absence of substantial evidence to the contrary the presumption is "That the claim comes within the provisions of this Act"; section 20 (a) of the Longshoremen's Act.

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill: *Grant v. Marshall, deputy commissioner*, 56 F. (2d) 654 (Wash. 1931); *United Employees Casualty Co. v. Summerous*, 151 S. W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner*, 56 F. (2d) 654 (Wash. 1931); *Gulf Oil Corporation v. McManigal, deputy commissioner*, 49 F. Supp. 75 (W. Va. 1943).

The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review: *South Chicago Coal & Dock Co., et al v. Bassett, deputy commissioner*, 309 U. S. 251 (1940); *Del Vecchio v. Bowers*, 296 U. S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U. S. 162 (1933); *Crowell, deputy commissioner v. Benson*, 285 U. S. 22 (1932); *Jules C. L'Hote, et al v. Crowell, deputy commissioner*, 286 U. S. 528 (1932), 71 C. J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U. S. 244 (1941); *Marshall, deputy commissioner v. Pletz*, 317 U. S. 383 (1943).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U. S. 244 (1941); *Liberty Mutual Ins. Co.*

v. Gray, deputy commissioner, 137 F. (2d) 926 (C. C. A. 9, 1943); *Michigan Transit Corporation v. Brown, deputy commissioner*, 56 F. (2d) 200 (Mich. 1929); *Del Vecchio v. Bowers*, 296 U. S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner, et al.*, 21 F. Supp. 535 (Me. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner*, 23 F. Supp. 748 (N. Y. 1938); *Simmons v. Marshall, deputy commissioner*, 94 F. (2d) 850 (C. C. A. 9, 1938); *Lowe, deputy commissioner v. Central R. Co. of New Jersey*, 113 F. (2d) 413 (C. C. A. 3, 1940); *Contractors, PNAB v. Pillsbury, deputy commissioner*, 150 F. (2d) 310 (C. C. A. 9, 1945).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage, deputy commissioner*, 63 App. D. C. 169, 70 F. (2d) 773 (1934); *Luckenbach Steamship Co., Inc. v. Norton, deputy commissioner*, 96 F. (2d) 764 (C. C. A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner*, 141 F. (2d) 964 (C. C. A. 5, 1944).

In considering the evidence the deputy commissioner may give weight to "the common-sense of the situation"; *Avignone Freres, Inc., et al. v. Cardillo, deputy commissioner, et al.*, 73 App. D. C. 149, 117 F. (2d) 385 (1940).

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *C. F. Lytle Co. v. Whipple, deputy commissioner*, 156 F. (2d) 155 (C. C. A. 9, 1946); *Contractors, PNAB v. Pillsbury, deputy commissioner*, 150 F. (2d) 310 (C. C. A. 9, 1945); *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner*, 309 U. S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U. S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner*, 137 F. (2d) 926 (C. C. A. 9, 1943); *Lowe, deputy commissioner, et al. v. Central R. Co. of New Jersey*, 113 F. (2d) 413 (C. C. A. 3, 1940); *Henderson, deputy commissioner v. Pate Stevedoring Co., Inc.*, 134 F. (2d) 440 (C. C. A. 5, 1943); *Del Vecchio v. Bowers*, 296 U. S. 280 (1935).

The following is a reference to so much of the testimony presented at the hearing before the deputy commissioner on January 8, 1948, as is considered sufficient to show that the finding of the deputy commissioner to the effect that the claim for compensation was timely filed, is supported by evidence. This reference is not intended to cover all of the testimony, as under the authorities it is necessary only to show that there is evidence to support the finding of the deputy commissioner.

Douglas D. Taylor, the claimant, testified at the hearing before the deputy commissioner on January 8, 1948, that he was a carpenter employed by Cooley and Gruver on March 11, 1946, and was working on a job on Blaine Street in the District of Columbia when in attempting to ascend a rough stairway his foot slipped off and he fell partly down; that his foot felt numb and dead; that there was not a whole lot of pain but he could not put his weight on his right foot and his foreman let him do some work which did not entail dependence upon that foot; that that night the foot became very painful and he went to see a Dr. Prosperi—(18A, 19A); that he gave Dr. Prosperi a full account of the occurrence of his slipping and falling on the stairway (26A); that Dr. Prosperi recommended hot applications and diagnosed the complaint as thrombus of the leg which had shut off the blood supply, causing the muscles to go dead (19A, 20A); that Dr. Prosperi gave him medicine and made a final diagnosis of thrombus; that the doctor gave him treatments with a machine to accelerate the blood flow and advised him that when the other blood vessels took up the load his leg would come back to almost normal (19A); that Dr. Prosperi told him that his trouble was an illness or disease and was not connected with the occurrence at the construction work, and that he, the doctor, had made a written report of the matter in which he stated that the condition resulted from an illness rather than from any accident; that he was treated all summer with this machine until Dr. Prosperi died that summer; that he went to see Dr. Payne (20A) in November 1946 (23A) and the latter advised him that there was no

thrombus but that a tendon was torn; that Dr. Payne treated it and gave him some medicine until the first part of the winter and then sent him to Dr. Hall; *that Dr. Hall told him the tendon was torn as the result of this accident and could be repaired by an operation*; that on May 16, (1947) he was operated on and did not work again until October 9: that he was in the hospital eleven days and was in a cast from his toes to his hip for about one month; that after this, part of the cast was removed and that he continued to wear a cast below his knee for one month; that after that he then wore a brace until he returned to work (21A); that he filed no claim for compensation at the time of the accident because Dr. Prosperi had told him the condition was an illness which was causing the disability; that he accepted the diagnosis and the word of the doctor; that he told Mr. Cooley, who was a member of the firm for which he worked, about the accident the day it occurred (22A); that in April (1947) Dr. Payne sent him to Dr. Hall and at that time claimant advised Mr. Emery Cooley, a member of the firm of employers, about his condition a day or so after seeing Dr. Hall, and told him that Dr. Hall recommended an operation; that he also wrote a letter to the deputy commissioner dated April 15, 1947, after being examined by Dr. Hall and being told of the true nature of the condition of his leg; that after making inquiries he went to see Mr. Cochran (of the deputy commissioner's office), and on May 16, 1947, filed a formal claim for compensation (24A, 25A); that his leg is very good now and is getting stronger all the time, although not yet back to normal, and that he goes to Dr. Hall for examinations every month; that he has worked continuously since his return to work on October 9, 1947.

Dr. Russell C. Payne testified at the same hearing that he first saw this claimant on November 18, 1946, and got his history which was that about March the patient started having trouble with his right leg; the last x-ray had been taken three or four months prior by Dr. Prosperi; that Dr. Prosperi diagnosed the case, according to the patient's history, as a blood clot and decalcification of the bone; that

the patient had received about 10 treatments of the vasodilator, but that these did not seem to help; that he (Dr. Payne) then saw the patient and started treatment; that the following March he sent the patient to Dr. Hall for consultation after having had x-rays taken; *that the diagnosis could not be confirmed by the x-rays*; that the claimant was then told that he had some difficulty with the tendon, *the nature of which they were not sure except that it was not a vascular thing at all* but was more of a bone degeneration, the nature of which was not yet evident; that Dr. Hall confirmed this diagnosis and inasmuch as the medical treatment was not doing as well as expected, surgery was suggested and was carried out (27A, 28A); that there was no evidence of any vascular disease at the time we examined him (29A); that based on the claimant's history of having slipped on the rough stair, this condition for which he treated him in his opinion has a causal connection; that there was nothing else in the history which would have contributed to the injury (30A, 31A); that in his opinion in the absence of a history of some other untoward event the slipping of the claimant on the stairway resulted in a tearing of the Achilles tendon from the os calcis (32A).

Dr. Curtis Lee Hall also testified that the claimant was referred to him by Dr. Payne and that he saw the claimant first on April 4, 1947 (33A); that the claimant told him that about a year previous his right ankle suddenly collapsed when he was on a stairway; that the claimant stated that at the onset the ankle was swollen and discolored; that he stayed away from his work for nine weeks; that he felt there was some disability about the ligaments and control of the ankle, he was unable to rise on his toes, the lift being very weak in the portion of the body of the right foot; that he also noticed an atrophy or wasting of the right foot muscles (34A); that he (the witness) examined the claimant and advised him that he needed repair of the adverse tendon by means of vascular transplantation, and that he then wrote the insurance adjuster that his finding was a tearing of the tendon and was not in the nature of an illness in any way; that the patient was then operated on at

the Doctors' Hospital on May 16, 1947, and the tendon was found to be torn and shredded (35A); that the operation confirmed the diagnosis (37A).

Charles E. Cooley testified that he was a member of the firm of Cooley and Gruver, the employer of Mr. Taylor; that he knew when this accident to Mr. Taylor occurred on March 11, 1946, and told Taylor when he was injured that he could either go to a hospital or to his own family physician; that although he knew Taylor went to a doctor he did not know the doctor's name at the time (32A).

The testimony above narrated shows that in November, 1946, a definite diagnosis was not made. The doctor did however rule out the previous diagnosis made by Dr. Prosperi, and said that the trouble was not a vascular thing at all but that it was more of a bone degeneration, the nature of which was not then evident and could not be confirmed by x-ray (28A).

The substance of the above testimony is that claimant did not know until April, 1947, that he had sustained a compensable injury and he filed his claim for compensation within a month after he had knowledge of the cause of his disability and relationship to the accident on March 11, 1946.

While the courts of the District of Columbia and others have variously stated the principle of law applicable in the present case the substance of such principle is that the time for filing a claim for compensation begins to run not from the time of the "accident", but from the time when the employee becomes aware of the nature of his disability and its relationship to an event or occurrence in the employment.

In the case of *Raymond v. Industrial Accident Commission*, 354 Ill. 586, 188 N. E. 861 (1934) the court said:

"It is clear from the record that if the doctor actually did have this opinion *it was not of a clear cut and well defined sort . . .* It is clear from the record that the time of actually opening the abdomen of the petitioner was the first moment when anyone was certain and positive that he was suffering from lead poisoning and this was on January 7, 1931."

In the case of *Di Giorgio Fruit Corporation v. Norton, deputy commissioner, et al.*, 93 F. (2d) 119, which arose under the Longshoremen's Act involved the time for filing claim under section 13 (a) as does the instant case; the employee injured his eye in July 1932 and *was disabled for about a week*". "He became aware of the serious condition of his injured eye in August, 1936" and filed claim for compensation at the latter time. (Quotation is from opinion in the case.) The court said in part:

"As might be expected, the state courts differ in their precise treatment of this question. Some decisions treat the period of limitation of time in which the claim must be filed as running from the date upon which the injury culminates; some from the date upon which the injury becomes apparent. Other decisions hold the period of limitation runs from the date upon which the injury becomes compensable. Though there is this divergence in terms used, nonetheless there is a unanimity of idea to be expressed, namely, *that the employee's claim is not barred until one year from the time in which the injury has reached a definite culminating stage and one which, being reasonably apparent, is therefore compensable.* * * *

"One further point urged by the appellants must be considered and disposed of. It is argued by them that even should this court adopt the ruling in *Kropp v. Parker*, supra, and hold that the word 'injury' as set out in section 13 (a) of the act should be construed to mean 'date of compensable injury', Henson's claim is barred nonetheless. With this contention we do not agree. As heretofore stated, conflicting testimony was given by Henson as to when he *became aware of* any serious difficulty with his left eye, and the medical testimony is far from clear as to the actual time at which the lenticular opacities became formed in Henson's eye. The Deputy Commissioner was the trier of the facts. His finding of August, 1936, as the date of compensable injury is supported by sufficient evidence. There is nothing upon the record which convinces us that we should disturb that finding." (Emphasis supplied.)

Accord: *Potomac Electric Power Company v. Cardillo, deputy commissioner*, 107 F. (2d) 962, 71 App. D. C. 163

(1939); *Kropp v. Parker*, deputy commissioner, 8 F. Supp. 290 (Md.); *National Casualty Company v. Cardillo*, deputy commissioner, 148 F. (2d) 117 (App. D. C.).

In the case of *Commercial Casualty Insurance Co. v. Hoage*, deputy commissioner, in Equity No. 57926, in a memorandum opinion by Justice Adkins filed on January 29, 1935, it was said:

“While there is some conflict in authorities, I think a reasonable construction of the statute is that *the claim before the Commission was filed in time if it is filed within one year after the employee had knowledge that compensable disability had resulted. He did not have this knowledge until his case was diagnosed as lead poisoning.*” (Emphasis supplied.)

In the case of *Dryden v. Omaha Steel Works*, 148 Neb. 1, 26 N. W. (2d) 293 (1947), the facts in brief were as follows:

On April 29, 1943, the employee fell, striking his head on a metal support sustaining lacerations which required medical treatment but did not result in immediate disability. There developed an infection at the point of injury and on May 7, 1943, he was hospitalized, received compensation and remained until May 28, 1943, at which time he returned home and on June 12 he returned to his work. He worked steadily until December, 1944, when he was directed by the company doctor to stop work. On January 6, 1945, he was confined to his bed; on February 4, 1945, he was again hospitalized and died on February 11 of pulmonary tuberculosis. It was the contention of the plaintiff that the accident of April 29, 1943, and subsequent infection therefrom lighted the tuberculosis latently existing and caused the death. In upholding an award to the widow, the court said:

“As heretofore set forth Dryden returned to work on June 12, 1943, it being supposed he had recovered from the accident of April 29, 1943, and the infection which followed. He worked continuously from that date until late in December, 1944. *Even though he was under a physician's care a good share of that pe-*

riod, the source of his trouble was not discovered. It is reasonable to assume, we think, that Dryden had no reasonable basis for supposing that his trouble was connected with the accident he sustained in April, 1943, when the physicians in charge were unable to make a correct diagnosis of his case. It was not until February 9, 1945, two days before Dryden's death, that it was determined that he was suffering from pulmonary tuberculosis. Until the nature of the disease was discovered, neither Dryden nor those succeeding to his interests after his death had any way of determining whether the disease stemmed from, or was activated by the injuries sustained in the previous accident. (Within the meaning of the law barring claims for compensation of a workman if not made within six months, a latent accidental injury, seeming at first to be trifling and not compensatory but subsequently resulting in a progressive disease and a disability, occurs when its true nature is discovered by him or when the diseased condition culminates in disability. Clary v. R. S. Proudfit Co., supra, (124 Neb. 582, 247 N. W. 419). The same rule applies to the filing of a petition as to giving of notice. The fact that Dryden worked steadily at his employment to within 50 days of his death is consistent with the view that he was oblivious of the true nature of the disease and of any notice that it was connected with the accident. In addition thereto, the record shows that plaintiff inquired of Dr. Hughes, the employer's physician, in January, 1945, as to whether Dryden then had a compensable disability, and he informed her that there was no connection between the then present disease and the injury sustained April 29, 1943. The opinion was undoubtedly founded upon an incorrect or incomplete diagnosis of the case but it was one upon which she could have expected to rely. The plaintiff cannot be held to a greater degree of knowledge of the case than the company's physician had. The petition was filed in the compensation court on February 9, 1946. Consequently, it was filed within one year from the time of discovery of the true nature of Dryden's condition and its connection with the accident." (Emphasis supplied.)

In *Baldin v. Scullion*, 50 Wyo. 508, 62 P. (2d) 531 (1936), the employee received an injury to his hip on July 15, 1934,

but continued to work until August, 1934, when he sought medical advice of physicians and was informed that he had arthritic rheumatism and was given some medicine and treatment. He returned to work after several weeks and worked until the latter part of January, 1935, when he was obliged to quit. His injury was then x-rayed and finally diagnosed as a fracture of the hip joint. In sustaining an award, the court said:

“We have referred to the fact that a compensable injury frequently occurs at the very time the accident happens, so it would appear proper that, when the right to file a claim for compensation after the mandatory statutory period of which complaint is made is insisted upon, it should become the clear duty of the trier of fact to determine upon proper and due preponderance of evidence the time when the employee actually suffered a compensable injury.

* * * “In the case at bar, we think there is substantial evidence to support the finding of the trial court that Scullion’s disability and compensable injury dated from the 17th of January, 1935. At that time it became *reasonably clear* that he had suffered a fracture of the acetabulum and was temporarily totally disabled. Prior to that time the doctors appeared to have treated him for arthritis and rheumatism, and he continued practically all the time to pursue his employment.

* * * We are naturally obliged to conclude, therefore that the employee’s claim was filed within the time.”

In *Selders v. Cornhuster Oil Co.*, 111 Neb. 300, 196 N. W. 316 (1923), the court said:

“Referring to a latent injury which at first appeared to be trifling but subsequently resulted in the loss of an eye, it was observed in a recent opinion: ‘It cannot be said that the injury resulted from the accident, within the meaning of the statute, before the time it was discovered that it might be permanent.’ *Johansen v. Union Stock Yards Co.*, 99 Neb. 328, 156 N. W. 515. This reasoning, applied to the findings of the District Court in the present case, supported as they are by sufficient evidence, justifies the conclusion that *the proceeding was maintainable, plaintiff having filed his*

claim promptly upon discovering his latent, previously unknown injury and the cause of his disability.” (Emphasis supplied.)

In *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, N. W. 615 (1924), the court said in part:

“Accidents frequently occur where the true nature of the injury and the resulting disability are not discernible for a considerable time even with the aid of scientific skill. When latent injuries from accidents do not first indicate disabilities which are compensable, an employee is not necessarily deprived of compensation under the workmen’s compensation Act, Comp. St. 1922, sec. 3056, for failure to demand his rights under the Act before such rights can reasonably be ascertained.”

In the case of *Marsh v. Industrial Accident Commission*, 217 Cal. 338, 18 P. (2d) 933 (1933), the court said in part:

“It is not surprising to find, therefore, that in those jurisdictions where occupational diseases are compensable it is almost universally the rule that the injury is not deemed to occur until ascertainable disability results * * *. And it may be noted that in our own state it has been held that an employee is not to be deprived of compensation because he fails to make a correct medical diagnosis.”

The opinion also cites the case of *Selders v. Cornhusker Oil Co.*, *supra*, stating the facts briefly and commenting approvingly as follows:

“Application for compensation was then made and granted, the court holding that the time began to run only from discovery of his latent and previously unknown injury.”

In *Anderson v. Contract Trucking Co.*, 48 N. M. 158, 146 P. (2d) 873 (1944), the court said in upholding an award:

“The better reasoned cases, if not the weight of authority, support the view we here entertain that such a statute of limitation, as to a latent injury which was not, or could not with reasonable diligence, have been

discovered until after one year and 31 days from the date of the accident would not bar the claim. To hold that the period of limitation starts running as of the date of the accident rather than as of the date upon which the injury culminates or becomes known as such would, in fact, in the language of the opinion in *Salt Lake City v. Industrial Commission, supra*, make 'the statute begin to run before the cause of action accrues.'

"He knew, say the defendants, at least as early as April 18, 1941, when he secured glasses from an optometrist, that his eyesight was somewhat impaired and therefore the claim should have been filed at least within a year and 31 days thereafter. We are unable to agree to the soundness of this contention. *It was not until plaintiff had consulted an eye specialist that he discovered that his eyesight was practically gone. Then, for the first time, the growing weakness of the eye was traced to the accident of Nov. 1940, which accident, plaintiff had been led to believe by the doctor who examined him at the time (the doctor of the employer, incidentally), could not have set in motion an effect leading to impairment of vision.*" (Emphasis supplied.)

In *Fee v. Department of Labor and Industries*, 151 Wash. 337, 275 P. 741 (1929), the court in referring approvingly to the opinion in *McGuire v. Phelan-Shirley and Co., supra*, said:

"In the last cited case, the court held that accidents resulting in injuries which prove to be progressive in their nature are of a class where the workman cannot be precluded from demanding his rights under the workmen's compensation act before such rights can reasonably be ascertained."

In *White v. Morgan and Wright*, 217 Mich. 499, 187 N. W. 257 (1922), the court said:

"Each case must be governed by its own facts. In the instant case the Department of Labor and Industry reached the conclusion upon the facts that the actual injury, disability, and incapacity did not develop or make itself apparent to the plaintiff until the operation was had. If there is any testimony or legitimate inferences which may be drawn from the testimony sus-

taining this conclusion, it must be accepted by us, even though we might reach a different conclusion if we were the triers of the facts. * * * The injury was a hidden one; the operation revealed that it was more serious than the diagnosis had indicated. Under all the circumstances here disclosed, we can not say that the finding of the Department has no support in the testimony or in the legitimate inferences to be drawn therefrom. * * * The award will be affirmed."

In *Bridges v. Fruin-Colnon Const. Co.*, 52 S. W. (2d) 582 (Mo. 1932), the court said:

"The law is well settled that a distinction is to be drawn between the terms 'accident', 'injury', and 'disability' within the meaning of the Act; and that the 6 months' period of limitation for filing the claim will commence to run from the time it becomes *reasonably discoverable and apparent* that a compensable injury has been sustained." (Emphasis supplied)

Accord: *Hickman v. Dunlop Tire*, 185 S. W. (2d) 874 (Mo. 1945); *Alford v. Industrial Accident Commission*, 169 P. (2d) 641 (Cal. 1945); *Kropp v. Parker, deputy commissioner*, 8 F. Supp. 290 (1934); *Swift & Company v. State Industrial Commission*, 161 Okla. 132, 17 P. (2d) 435 (1932); *Tice v. State Industrial Accident Commission*, decided June 29, 1948, 195 P (2) 188, ... Oregon (not yet officially reported).

It is respectfully submitted that under the foregoing authorities the limitation in section 13 (a) of the District of Columbia compensation law did not begin to run until the employee had knowledge, or became aware of the fact that he had sustained a "compensable injury"; he did not know that his disability was the result of a torn Achilles tendon which he sustained at the time of the accident on March 11, 1946, until this condition was correctly diagnosed. Whether the correct diagnosis was in November, 1946, or in April, 1947, his claim was timely filed on May 16, 1947.

Appellant states in its brief (page 7) that where "the injury is patent and observable from the beginning and the employee is unable to work for over seven weeks immedi-

ately following the injury (accident) failure to make claim for compensation for more than a year bars recovery'' and cites *Liberty Mutual Insurance Company v. Parker, deputy commissioner*, 19 F. Supp. 686 (Md. 1937), and *Kobilkin v. Pillsbury, deputy commissioner*, 103 F. (2d) 667 (C. C. A. 9 1939), aff'd. 309 U. S. 619.

The appellant's statement directly implies a situation of *patency* and *awareness*, not only of the *existence* of the physical disability, but knowledge of such existence plus knowledge on the part of the employee that the disability was caused by an industrial accident. In the present case, all that the employee knew until April 1947, was that his physical disability was due to a thrombus, a disease not in any way caused by an accident in his employment. It is true that he experienced the pain on March 11, 1946, when his foot slipped on a step, but if he should have had a thrombus, as he was advised by his first physician, he nevertheless would have had the pain. Knowledge of the fact of pain following a slipping of the foot is not knowledge of the *cause* of that pain or knowledge of causal relationship between the slipping and disabling condition following the slipping. This employee simply did not know that he had sustained a compensable disability as he accepted medical advice (which he had the right to rely on) to the effect that his disability was due to disease and not to an accident.

The first cited case is distinguishable from the instant case in that in the *Liberty* case there was *no erroneous* diagnosis as to the cause of the condition which was present from the date of the accident. From the beginning the condition had been correctly diagnosed and the claimant knew that he had a ganglion resulting from the accident. The employee therefore *knew from the start* that he had sustained a compensable injury; in the instant case, the employee did not know until almost a year after the accident (1) the true nature of his condition or (2) that it was related to the injury.

The second case cited, namely, the *Kobilikin* case, is likewise distinguishable. In that case the employee sustained an injury to his shoulder and received compensation for the

period of disability (three weeks) immediately following the accident. He knew he had been hurt on the job and that his disability was due to that hurt. Almost two years later it was discovered that the injury was *more serious* than originally considered and claim was then filed for the increased disability. There was therefore no lack of knowledge of the cause of disability, but underestimate of the total effect of the injury. Section 13 (a) of the Longshoremen's Compensation Act, (33 U. S. C. A. 913 (a)) provides that claim for compensation shall be filed within one year after the injury or if payment of compensation is made without an award, within one year after the date of last payment. The employee in that case did not file his claim within one year after the injury nor within one year after the date of last payment of compensation; the deputy commissioner rejected the claim, *finding that it was not timely filed*. It was the deputy commissioner's finding which was sustained in the United States District Court, United States Circuit Court of Appeals, and United States Supreme Court, (although the decision was affirmed in the latter court by a divided court, four to four).

Neither of such two cases cited by appellant can be said to be authority *contra* to the uniformly accepted principle of workmen's compensation law, as stated or applied in the numerous cases which we have cited *supra*, namely, that an injured employee is not required to file claim before he knows that he has a basis for a claim. The limitation provisions of the Act are not interpreted or applied so as to ensnare or entrap unwary claimants. The injustice which would result, if the principle of law above discussed should not exist, is so apparent as not to need amplification. A contrary view of the law would not afford that liberal construction which it is stated should be given to the workmen's compensation law. *Baltimore & Philadelphia Steamboat Co. v. Norton*, deputy commissioner, 284 U. S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris*, 61 App. D. C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al. v. Cardillo*, deputy commissioner, 70 App. D. C. 303, 106 F. (2d) 327 (1939);

DeWald v. Baltimore & O. R. Co., 71 F. (2d) 810 (C. C. A. 4, 1934); cert. den. October 8, 1934, 293 U. S. 581.

In view of the evidence in the instant case as to the time of discovery or "knowledge" of the true condition, and the many authorities which hold in substance that the time for filing claim for compensation does not begin to run until the employee becomes aware or the actuality that he has sustained a compensable injury is reasonably discernible, it follows that the deputy commissioner's finding to the effect that the claim in the present case was timely filed, has "substantial roots in the evidence" and was not "forbidden by the law." Where these circumstances exist the Supreme Court has stated that the compensation order is in accordance with law. *Cardillo, deputy commissioner, v. Liberty Mutual Insurance Company*, 330 U. S. 469, (1947).

CONCLUSION

The judgment of the court below sustaining the compensation order was correct and should be affirmed.

GEORGE MORRIS FAY,
United States Attorney

JOHN D. LANE,
*Assistant United States Attorney
Attorneys for Appellee Britton*

ROBERT J. HAWKINS
Attorney for Appellee Taylor

WARD E. BOOTE
*Chief Counsel
Bureau of Employees' Compensation
Federal Security Agency*

HERBERT P. MILLER
*Assistant Chief Counsel
of Counsel*

